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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANDREW DUPREE, Plaintiff, v. APPLE, INC; TIM COOK; BRENDA EVERSON; and SUZANNE PIERRE-ZILES, Defendants.	Case No. 16-CV-0289 LHK **REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Date: June 8, 2017 Time: 1:30 p.m. Judge: Honorable Lucy H. Koh Court: Courtroom 8 San Jose Division

I. INTRODUCTION

Plaintiff's largely unverified and unsupported opposition makes clear that this action presents precisely the kind of workplace issues that courts consistently refuse to entertain. His claims rest on alleged minor slights and speculation. Plaintiff's ever-shifting claims and belated new liability theories do not hide the fact that he lacks actual evidence to support his claims. Summary judgment is therefore warranted.

II. LEGAL ANALYSIS

A. Plaintiff's Claims for Race, Color, and National Origin Harassment Fail.

Plaintiff cannot escape the simple reality that the conduct he alleges in this case was neither severe nor pervasive. Moreover, Apple cannot be held liable for the alleged harassment because Apple took reasonable steps to address Plaintiff's allegations. Both issues are fatal to Plaintiff's claims for harassment.

1. The Alleged Conduct was Neither Severe Nor Pervasive.

Plaintiff's assertions that, in the span of three months someone once referred to him as "Oakland," another person asked if he was "part of a diversity program," and a third person declined his assistance supposedly because he had a "gang bandana" in his pocket, do not come anywhere near the degree of severity or pervasiveness required to establish an actionable harassment claim. Title VII and FEHA are not civility codes, and courts have consistently held that conduct more egregious than what is presented here does not, as a matter of law, give rise to a viable harassment claim. *See, e.g., Vasquez v. County of Los Angeles*, 349 F.3d 634, 642-44 (9th Cir. 2003) (holding that alleged unfair treatment plus comments that the plaintiff had a "typical Hispanic macho attitude" and "Hispanics do good in the field" did not give rise to a viable harassment claim); *Sanchez v. City of Santa Ana*, 936 F.3d 1027, 1036-37 (9th Cir. 1990) (holding that the posting of a racially offensive cartoon, the use of offensive slurs, and the failure to provide Hispanic police officers adequate backup did not give rise to a viable harassment claim); *Stevens v. County of San Mateo*, No. C 04-2762 SI, 2006 U.S. Dist. LEXIS 12498, at *13-14, 17-18 (N.D. Cal. Mar. 7, 2006), aff'd in 267 Fed. Appx. 684, 685-86 (9th Cir. 2008) (holding that supervisor's multiple comments to the plaintiff that "you're my ["N"-word]" and co-workers' reference to the plaintiff as "OG," which had negative racial undertones, did not give rise to a viable harassment claim).

In an attempt to salvage his harassment claims, Plaintiff tacks on, in shotgun fashion: (1) his allegation that Chad Flores switched a shift with him without his permission; (2) he worked shifts at the Cupertino store; and (3) Marina Wright made an inappropriate remark to him. (ECF No. 79 at 21-22.) These allegations are irrelevant and unavailing. No evidence suggests that these alleged events have anything to do with Plaintiff's race, color, or national origin. First, Plaintiff concedes that he and Mr. Flores were friends (*see id.* at 4, 13), and he offers no explanation, let alone evidence, that Mr. Flores acted with racial or ethnic animus when he erroneously switched a shift with Plaintiff. Second, this same evidentiary gap plagues Plaintiff's claim that Ms. Wright's poor use of words on January 31, 2016 had anything to do with race, color, or national origin. The record shows that the two were friends (*see id.* at 4, 5, 13), and Plaintiff presents no evidence that Ms. Wright's remark was motivated by racial animus. Third, in perhaps the most blatant example of Plaintiff's overreach and exaggeration, Plaintiff's own evidence refutes his allegation that he was forced to work shifts at the Cupertino store because of his race, color, or national origin. The message Plaintiff offers as evidence states as follows:

> Hey there! [The Cupertino store] needs some additional support the week of Jan 2-8. If you're interested in a shift, please reply to this message indicating which you'll take.
>
> Reminder: we aren't changing your schedule here @ [Los Gatos], & you have to stay BELOW 40 hours total for the week. Be conscious of both those things when volunteering for shift(s) there!

(ECF No. 81, Ex. B.) As his own evidence makes clear, Plaintiff *volunteered* to take the shift(s) at the Cupertino store, and his decision had *no* adverse impact on his work schedule at the Los Gatos store. If anything, working at the Cupertino store constituted a welcomed *benefit* to Plaintiff, who worked part-time, indicated a desire to work more hours, and moved to California for the specific purpose of working at Apple's main campus in Cupertino, which he viewed as an opportunity to advance his career. (*See* Sec. Decl. of Mitchell Boomer, Ex. A ("Pl.'s Depo") at 27:4-24.)

2. Apple Reasonably Addressed Plaintiff's Allegations.

Even assuming *arguendo* that the above allegations could somehow give rise to a harassment claim based on race, color, or national origin, Apple still cannot be held liable. All of the alleged harassers were Plaintiff's co-workers. Therefore, Apple may be held liable for their conduct only if it knew or should have known of the harassment but did not take adequate steps to address it. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). That is not the situation here; Apple reasonably addressed all of Plaintiff's allegations.

With respect to the alleged "Oakland," "diversity program," and "gang bandana" remarks, Plaintiff only notified his supervisors days or weeks *after* the alleged events occurred and, as Plaintiff admits, he "wasn't able to give insightful detail" and did not know the identities of the individuals who allegedly made the remarks. (ECF No. 79 at 6.) At most, Plaintiff suggested that the alleged harassers were unidentified "corporate employees." Yet even this story changed. *A year after the alleged events occurred*, and only after this Court rejected Plaintiff's attempt to expand his lawsuit to include a disparate impact claim for race discrimination, did Plaintiff produce, at his deposition, declarations from his brother and his friend that purport to identify two of the alleged harassers.[1] In a remarkable coincidence, Plaintiff's brother and his friend just happened to be present at the Los Gatos store and somehow overheard the names of the alleged harassers as the alleged incidents unfolded. According to Plaintiff's brother and his friend, two of the alleged harassers, whose identities had previously been a mystery to Plaintiff for over a year, were *Plaintiff's own co-workers*.

Setting aside these declarations, it remains undisputed that Plaintiff was unable "to give insightful detail" into the alleged events and his supervisors did what they could in response to his vague allegations at the time. They provided Plaintiff emotional support and, as Plaintiff admits, reiterated that he could and should bring any uncomfortable situations to their attention in the future so that they could address them immediately. Ms. Mallonee also indicated that she would

[1] As stressed in Apple's opening brief, Plaintiff had ample opportunity to "discover" this information. Plaintiff's brother and his friend were aware of Plaintiff's on-going litigation against Apple and, in fact, submitted declarations on his behalf in the previously dismissed "*Dupree I*" matter. Yet Plaintiff only "discovered" this information and produced these declarations at his February 17, 2017 deposition, over a year after the initiation of this lawsuit.

keep an eye out for any uncomfortable situations in the future and, moreover, discussed other ways in which she and Apple could support Plaintiff. No reasonable fact finder could find that Apple did not adequately address Plaintiff's vague allegations.

Apple's responses to Plaintiff's complaints about the incidents involving Mr. Flores and Ms. Wright were similarly reasonable. Apple took no disciplinary action against Plaintiff for the erroneous shift switch, and Plaintiff's supervisor facilitated a conversation between Plaintiff and Mr. Flores in which Mr. Flores apologized to Plaintiff. As for the incident involving Ms. Wright, Apple issued her a written "Misconduct," the most serious behavior-rated form of discipline at Apple short of termination. Apple also made clear to Ms. Wright that any future policy violations could lead to further discipline, up to and including termination. Again, no reasonable fact finder could conclude that Apple failed to address these situations adequately.

B. Plaintiff's Claims for Race, Color, and National Origin Discrimination Fail.

Plaintiff's opposition attempts to shift his theory of liability for his discrimination claims. In his Third Amended Complaint, Plaintiff expressly alleges that Apple discriminated against him because of his race, color, and national origin by failing to investigate further when he told his supervisors about the alleged "Oakland," "diversity program," and "gang bandana" remarks. (ECF No. 48 ¶¶ 41, 50.) Plaintiff now argues for the first time in his opposition that the alleged remarks themselves, as well as his shift dispute with Mr. Flores and his shift additions at the Cupertino store, constitute discrimination. (ECF No. 79 at 21.) The Court should disregard these new theories of liability for Plaintiff's discrimination claims.[2] *See La Asociacion De Trabajadores De Lake v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010) ("[A party cannot] effectively amend its Complaint by raising a new theory of [liability] in its response to a motion for summary judgment."); *Newton v. Am. Debt Services, Inc.*, 75 F. Supp. 3d 1048, 1063 (N.D. Cal. 2014) (rejecting the plaintiff's attempt to change legal theories in opposition to summary judgment).

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[2] The Third Amended Complaint is not entitled to liberal construction as a result of Plaintiff's *pro se* status. Plaintiff's former counsel Barbara Lawless, an experienced employment lawyer, drafted this pleading, and Plaintiff filed it while represented by counsel. (*See* ECF No. 48.)

Even if the Court were to consider them, these new liability theories do not give rise to a viable discrimination claim based on race, color, or national origin. The three alleged remarks with purportedly racial undertones do not constitute "employment actions" in the context of a discrimination claim. Employment actions in the context of discrimination claims are distinct from general harassing conduct and involve personnel decisions and functions such as termination, demotion, and negative performance reviews. *See Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000); *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 63-65 (1996) (distinguishing between conduct that may give rise to harassment and conduct that may give rise to discrimination, the latter being conduct involving personnel decisions). Also, as explained above, no evidence shows Plaintiff's shift dispute with Mr. Flores or shift additions at the Cupertino store had anything to do with Plaintiff's race, color, or national origin. (*See, supra*, Section II.A.) Thus, even Plaintiff's newly advanced discrimination theories fail as a matter of law.

C. Plaintiff's Claim for Retaliation Cannot Be Sustained.

1. Plaintiff's "Shift Switch" Dispute is Not Evidence That Can Support an Actionable Retaliation Claim Against Apple.

As explained in Apple's opening brief, Plaintiff's allegation that the shift switch dispute between him and Mr. Flores constitutes retaliation fails for three reasons: (1) the misunderstanding, which resulted in an apology and *no disciplinary action* against Plaintiff, is not an "adverse employment action;" (2) there is no causal link between this incident and any purported protected activity by Plaintiff; and (3) Apple cannot be held liable for Mr. Flores' conduct since Apple did not encourage or ratify it. (ECF No. 76 at 15-18.)

Plaintiff does not even attempt to address the first or third reasons discussed in Apple's opening brief. He cannot. It is undisputed that Plaintiff did not receive any discipline or suffer any other "adverse employment action" as a result of the misunderstanding between him and Mr. Flores. Nor did Apple ratify, encourage, or condone the misunderstanding in any way. To the contrary, Apple facilitated a frank discussion between Plaintiff and Mr. Flores to resolve their misunderstanding, which led to Mr. Flores apologizing to Plaintiff. These undisputed facts cannot give rise to a retaliation claim against Apple.

Plaintiff's singular focus on causation in his opposition is misguided. Plaintiff points to notes from Apple's interview of Mr. Flores, wherein Mr. Flores indicates that he learned about Plaintiff's prior lawsuit against Apple. (EFC No. 81 at 36.) Notably, Plaintiff ignores the fact that Mr. Flores only learned about Plaintiff's lawsuit in December 2015 (*id.* at 36), yet the misunderstanding between him and Mr. Flores took place in early November 2015 (*id.* at 35.) In other words, Mr. Flores learned about Plaintiff's lawsuit only *after* the shift switch dispute had already occurred. This sequence of events alone defeats Plaintiff's suggestion that a causal link connects his prior lawsuit against Apple to his trivial misunderstanding with Mr. Flores, and constitutes yet another fatal blow to Plaintiff's claim for retaliation against Apple. Further, Plaintiff ignores the rest of the notes, which plainly indicate that Mr. Flores kept the matter to himself, considered the matter Plaintiff's own personal business and past, and felt it was *Plaintiff* who withdrew from him as a friend. (*Id.* at 36-37.)

2. Plaintiff's Newly Asserted Retaliation Theories Also Lack Merit.

Plaintiff argues for the first time in opposition that the following alleged acts were also retaliatory: (1) Apple allegedly subjected him to interactions where racial remarks were made; (2) Kris Mallonee allegedly responded to his complaint about alleged racial remarks by telling him to "grow thicker skin;" (3) Plaintiff worked shifts at the Cupertino store; and (4) Ms. Wright's poor use of words on January 31, 2016. (ECF No. 79 at 22-23.) As with Plaintiff's new theories of liability regarding alleged racial discrimination, the Court should disregard these new, belatedly asserted theories of liability. *See La Asociacion De Trabajadores De Lake*, 624 F.3d at 1089; *Newton v. Am. Debt Services, Inc.*, 75 F. Supp. 3d at 1063.

Plaintiff's new allegations also fail on the merits as a matter of law. First, even assuming *arguendo* a causal link between the alleged "Oakland" and "diversity program" remarks and Plaintiff's prior lawsuit against Apple,[3] these remarks are not sufficiently severe or pervasive to constitute retaliation. *See Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (explaining that

[3] The "gang bandana" remark at the Cupertino store cannot be included in this list because there is no evidence regarding the identity of this alleged harasser. Nor is there any evidence showing that anyone at the Cupertino store had knowledge of Plaintiff's lawsuit.

alleged retaliatory harassment may be actionable under Title VII only if sufficiently severe or pervasive); *accord Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1054 (2005) ("[A] mere offensive utterance or even a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [a claim for discrimination or retaliation under FEHA]"). Nor is there any evidence that Apple ratified or encouraged such conduct, or that these two employees knew of Plaintiff's prior lawsuit or other complaints about Apple's treatment of him. *See Watson v. Las Vegas Valley Water District*, 268 Fed. Appx. 624, 627 (9th Cir. 2008) (explaining that an employer cannot be held liable for co-worker retaliation if the employer did not ratify or encourage the conduct).

Second, Ms. Mallonee's alleged remark does not constitute an adverse employment action for retaliation purposes under Title VII or FEHA. *See Cozzi v. County of Marin*, 787 F. Supp. 2d 1047, 1069 (N.D. Cal. 2011) ("In general, the failure to conduct an adequate investigation after an alleged act of discrimination cannot be considered an action that materially affects the terms, conditions, or privileges of employment under FEHA, and cannot be considered an action that reasonably would deter an employee from engaging in protected activity under Title VII."). This is especially true when Ms. Mallonee's alleged remark is taken into full evidentiary context. During this conversation, Ms. Mallonee gave Plaintiff a side-hug and sought to be emotionally supportive of Plaintiff. (ECF No. 76 at 3.) Moreover, as Plaintiff admits, Ms. Mallonee explicitly told him that if he ever felt uncomfortable, he should notify her immediately, and that she would "keep an eye out" for any future uncomfortable situations. (ECF No. 76 at 3; ECF No. 79 at 7.) Last, it is undisputed that Ms. Mallonee and Plaintiff discussed other ways she could support him, such as offering different shifts, and Plaintiff told her that he appreciated her support. (ECF No. 79 at 7.) Routine human interactions of this sort do not constitute adverse employment actions. Indeed, if it did, employers would struggle to find employees willing to take on managerial duties.

Third, as explained above, Plaintiff *volunteered* for the shifts at the Cupertino store and, if anything, Plaintiff perceived the shifts as being *beneficial* to him. (*See*, *supra*, Section II.A.)

Fourth, the incident with Ms. Wright concerned the location of a returned computer, not Plaintiff's lawsuit. Even assuming for the purposes of argument that there was a connection, Apple did not ratify or encourage Ms. Wright's conduct. Apple issued Ms. Wright the most serious form of discipline short of termination and warned Ms. Wright that any further policy violations would result in further discipline, including potential termination. Because Apple did not ratify or encourage Ms. Wright's conduct, it cannot be held liable for it. *See Watson*, 268 Fed. Appx. at 627.

D. Plaintiff's Claim for Intentional Infliction of Emotional Distress Also Fails.

Plaintiff does not meaningfully address Apple's arguments for summary judgment on this claim. As explained in Apple's opening brief, this claim fails because: (1) the alleged conduct does not rise to the level of "extreme and outrageous conduct;" (2) Apple cannot be held liable for the alleged "Oakland," "diversity program" and "gang bandana" remarks because they were made outside the scope of any employment; (3) Ms. Wright did not intend to cause Plaintiff emotional distress during the January 31, 2016 incident; and (4) to the extent that Plaintiff seeks to recover emotional distress for the incident involving Ms. Wright, his civil claim is preempted by the workers' compensation exclusivity doctrine. (*See* ECF No. 76 at 18-21.) These arguments stand unrebutted. Thus, summary judgment is warranted for each of these reasons.

E. Plaintiff Cannot Salvage His Ralph Act Claim.

Plaintiff also changed his theory of liability for his Ralph Act claim. The Third Amended Complaint alleges Ms. Wright violated the Ralph Act by making threats of violence against Plaintiff because of his *gender*. (ECF No. 48 ¶ 92.) In his opposition, Plaintiff abandons this theory and now claims for the first time that Ms. Wright violated the Ralph Act by making threats of violence against him because of his *race*. (ECF No. 79 at 23.) Again, such last minute changes to the theory of liability presented in the pleadings are improper and cannot rescue this claim from summary judgment. *See La Asociacion De Trabajadores De Lake*, 624 F.3d at 1089; *Newton*, 75 F. Supp. 3d at 1063. Nor, in any event, has Plaintiff produced any evidence that Ms. Wright's alleged remarks on January 31, 2016 had anything to do with his *race*. Plaintiff has not produced any evidence of any racial remarks made by Ms. Wright during the incident or any other evidence that might demonstrate that Ms. Wright's alleged remarks were made *because of* Plaintiff's race.

With respect to the claim actually pled in the operative complaint (*i.e.*, a *gender*-motivated threat of violence), Plaintiff fails to present evidence that Ms. Wright's comment on January 31, 2016 was motivated, let alone "substantially motivated," by his gender. *See* Cal. Civ. Jury Instr. ("CACI") 3063-64. Plaintiff simply states, without providing any further explanation or support, that "[i]t's worth noting that [Ms. Wright] has claimed feminist values several times and publicly stated her disgust for men at times." (ECF No. 79 at 14.) Procedurally, this unverified statement is not admissible affirmative evidence, as is required for opposing a motion for summary judgment. *See British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("[L]egal memoranda . . . are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists."); *Hernandez v. Ventura County*, No. CV 09-6756 GHK(JC), 2014 U.S. Dist. LEXIS 136502, at *24 (C.D. Cal. July 30, 2014) ("Neither an unverified complaint, nor unsworn statements made in the opposition [papers] can be considered as evidence at the summary judgment stage.").

Substantively, this fleeting, conclusory statement does not create a genuine dispute as to whether Ms. Wright's remark was *substantially* motivated by Plaintiff's gender, particularly in light of the evidence in the record. Plaintiff does not dispute that (1) he and Ms. Wright were friendly, both at work and outside of work (ECF No. 79 at 13); (2) the January 31 incident arose out of and concerned the location of a computer (*id.* at 15); and (3) most critically, Ms. Wright never disparaged or even referenced his gender at any point during the incident. Against this backdrop, Plaintiff's "scintilla" of an argument that this incident had something to do with his gender cannot defeat summary judgment. *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit,[4] lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

[4] Plaintiff's unverified opposition does not even constitute an affidavit, as it is not signed under penalty of perjury.

III. CONCLUSION

As shown above, Plaintiff has failed to produce admissible affirmative evidence showing a genuine issue of material fact with respect to any of his claims. Apple respectfully requests the Court grant its motion for summary judgment in its entirety.

Dated: May 18, 2017

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